Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1997

MELANIE SATTERFIELD,

Petitioner.

vs.

WAL-MART STORES, INC.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employee seeking unforeseeable leave under the Family and Medical Leave Act of 1993 ("FMLA") is required as an initial matter to notify her employer of anything other than leave is needed.

2. Whether an employee who has notified her employer of her need to take unforeseeable FMLA leave can be fired by her employer on the onset day of the employee's illness even though the employer has made no effort to obtain additional information on the employee's illness through informal means and even though the employee's illness subsequently develops into a serious health condition within the meaning of the FMLA.

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In The

Supreme Court of the United States

October Term, 1997

No. 98-_____

Melanie Satterfield,
Petitioner.,

vs.

Wal-Mart Stores, Inc.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Melanie Satterfield hereby petitions this Court for a writ of certiorari to be issued to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix) is reported at 135 F.3d 973 (5th Cir. 1998). The district court rendered no opinion in this case.

JURISDICTION

The Court of Appeals issued its opinion and judgment on February 25, 1998, issued a revised opinion on March 17, 1998, and denied rehearing on March 25, 1998. Accordingly, this petition is filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

29 U.S.C. §2612. Leave requirement.

(a) In general. (1) Entitlement to leave. Subject to section 103 [29 USCS §2613], an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

* * * * *

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 C.F.R. §825.100(a)

(a) The Family and Medical Leave Act of 1993 (FMLA or Act) allows "eligible" employees of a covered employer to take job-protected, unpaid, leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a

serious health condition, or because the employee's own serious health condition makes the employee unable to perform the functions of his or her job (see §825.306(b)(4)). In certain cases, this leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule. (As amended, eff. March 30, 1995)

29 C.F.R. §825.114(a)(2)(i)(A)

(a) For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

* * * * *

(2) *Continuing treatment* by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(i) A period of *incapacity (i.e.,* inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (*e.g.,* physical therapist) under orders of, or on referral by, a health care provider; or . . .

29 C.F.R. §825.220(c)

(c) An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

29 C.F.R. §825.302(a) and (b)

(a) An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement for adoption. Whether the leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the

employee shall advise the employer as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown.

(b) "As soon as practicable" means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. For foreseeable leave where it is not possible to give as much as 30 days notice, "as soon as practicable" ordinarily would mean at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee.

29 C.F.R. §825.303(a) and (b)

(a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of leaving of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

(b) The employee should provide notice to the employer either in person or by telephone, telegraph, facsimile ("fax") machine or other electronic means.

Notice may be given by the employee's spokesperson (*e.g.*, spouse, adult family member or other responsible party) if the employee is unable to do so personally. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.

29 C.F.R. §825.305(a) and (c)

(a)An employer may require that an employee's leave to care for the employee's seriously-ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's ill family member. An employer must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by §825.301. An employer's oral request to an employee to furnish any subsequent medical certification is sufficient.

*****

(c) In most cases, the employer should request that an employee furnish certification from a health care

provider at the time the employee gives notice of the need for leave or within two business days thereafter, or, in the case of unforeseen leave, within two business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration.

STATEMENT

In June of 1995, Melanie Satterfield ("Satterfield") was employed as a cashier at Wal-Mart's store in New Boston, Texas ("the store"). Satterfield's mother, Jean Grimes ("Grimes"), also worked at the store. Satterfield was scheduled to work at the store on Friday, June 16, 1995.

When Satterfield woke on the morning of June 16, 1995, she was having a lot of pain in her right side. She had never had this pain before, did not know what was causing it, and did not know how long it was going to last. Satterfield was unable to go to work on June 16, 1995, because of her pain.

Satterfield did not have a telephone at her home at the time and could not telephone the store to notify the store manager of her upcoming absence from work. In lieu of calling the store, she decided to write a note to the store and ask Grimes to deliver same.

In her note, Satterfield wrote she was in pain, was not going to be able to come to work that date, and asked if she could make up the absence on one of her future days off. Satterfield did not state in her note when she would be returning to work because she did not know this on June 16, 1995.

Grimes read Satterfield's note and agrees that the contents of the note were as stated by Satterfield. Grimes delivered the note to the store on the morning of June 16, 1995. Mark Neighbors, the manager of the store, acknowledges that he received Satterfield's note on June 16, 1995. He threw the note away.

Satterfield continued to be in pain on June 16, 1995, to the point that she felt she needed to see a doctor. On the afternoon of June 16, 1995, she drove to a nearby convenience store and telephoned her doctor in New Boston, Dr. R. S. Gurav. Dr. Gurav was unable to see her that day but made her an appointment for Tuesday, June 20, 1995. This was as soon as Dr. Gurav could see her.

Grimes and Neighbors had a conversation about Satterfield at the store on June 16, 1995, in which Grimes told Neighbors about the pain Satterfield was having but stated that she did not know what was wrong with Satterfield.

Neighbors fired Satterfield on June 16, 1995, because she failed to report to work that day. Although Neighbors may have had in mind previous work absences of Satterfield when he fired her on June 16, 1995, it is undisputed that he fired her because of her work absence on June 16, 1995, not because of previous work absences.

Between June 16, 1995, and June 20, 1995, Satterfield remained at home in bed.

On June 20, 1995, Satterfield went to see Dr. Gurav at his office. Dr. Gurav prescribed pain pills and antibiotics for Satterfield's pain.

Dr. Gurav gave Satterfield a written medical excuse on June 20, 1995, in which he stated that Satterfield was under

his care and should be excused from work. Grimes delivered this excuse to the store on the same day it was written.

Satterfield continued to have pain in her side after seeing Dr. Gurav on June 20, 1995. On the night of June 27, 1995, the pain became so severe she had to seek treatment for it at the emergency room of the New Boston Hospital. She saw Dr. Gurav in the emergency room, was given a pain injection, and was told by Dr. Gurav to report to the hospital the next day for exploratory surgery to determine the cause of her pain. She was discharged from the emergency room early in the morning on June 28, 1995.

Dr. Gurav gave Satterfield a written medical excuse when he discharged her from the emergency room in the early morning on June 28, 1995. The excuse stated that Satterfield "has been under [Dr. Gurav's] care from 6/20/95 to date and is able to return to work on: indefinite." Grimes delivered this excuse to the store on June 28, 1995.

Satterfield reported to the New Boston Hospital as directed by Dr. Gurav on the morning of June 28, 1995. When Satterfield attempted to be admitted to the hospital for the surgery and a check was made on her medical insurance, she was advised by the hospital staff that her medical insurance through Wal-Mart had been canceled because she had been fired and that she could not be admitted to the hospital unless she was prepared to pay the hospital costs herself. This was Satterfield's first knowledge that she had been fired by Wal-Mart. She had to cancel her exploratory surgery scheduled for that day because she could not afford to pay the hospital costs.

After the incident at the hospital, Satterfield called Mark Neighbors at the store. She told him of her health condition, that she was supposed to have surgery for her condition but could not do so because her Wal-Mart medical insurance had been canceled, and asked for Neighbors' help. Neighbors acknowledges receiving this call and that the contents of the call were as stated by Satterfield. Neighbors told Satterfield that she was no longer employed by Wal-Mart and that there was nothing he could do for her.

Subsequent to June 28, 1995, Satterfield continued to have pain and still could not stand for long periods of time. On July 4, 1995, and again on July 10, 1995, she had to seek treatment for the pain in the emergency room of the New Boston Hospital. On both occasions, she saw Dr. Gurav and was given pain injections.

On August 8, 1995, Satterfield wrote the following letter to Terry Pharr, Wal-Mart's District Manager:

> My name is Melanie D. Satterfield, I've been with Wal Marts (sic) for 2-1/2 yrs. Mark Neighbors fired me while I was under Dr. R. S. Gurav's care. I had insurance through Wal Marts (sic) and it was cut off before Dr. Gurav could do surgery on me, Even (sic) though they took the full amount of money for insurance out of my last paycheck. I have spoken with an attorney who said I should have been covered by the Family and Medical Leave Act. He says I have a claim. All I wanted was to have surgery so I could stop hurting and get well so I could come back to work. But I was Fired (sic) for being sick. Please give this situation your full attention.

Pharr received this letter and requested his secretary to look into the matter. Upon learning that Satterfield did not see Dr. Gurav until June 20, 1995, after she was fired, Pharr concluded that Neighbors had acted correctly in firing Satterfield and that no further investigation of the matter was warranted. Pharr never even responded to Satterfield's letter of August 8, 1995.

Satterfield continued to have problems with her pain. She had to seek treatment for it at the emergency room of the New Boston Hospital on September 16, 1995, and on February 18, 1996.

In April of 1996, Satterfield qualified for Medicaid medical assistance. This enabled her to have the surgery Dr. Gurav had recommended that she have on June 28, 1995. Dr. Gurav performed this surgery on April 3, 1996. Dr. Gurav's postoperative diagnosis of Satterfield was "pelvic congestion syndrome or varicosity of broad ligament." Dr. Gurav performed a D & C on Satterfield to resolve this problem.

Satterfield's pain ceased immediately after her surgery on April 3, 1996. Within two weeks after the surgery, she was on her feet and able to work.

Satterfield never received any correspondence, inquiries, or directives of any sort from Wal-Mart on June 16, 1995, or at any time subsequent thereto.

Satterfield brought this action against Wal-Mart in the United States District Court for the Eastern District of Texas, Texarkana Division, claiming that she was fired from the employ of Wal-Mart on June 16, 1995, in violation of her rights under the FMLA. Jurisdiction in the district court was based on 28 U.S.C. §1331.

The district court submitted the case to the jury on the issues of whether Wal-Mart's termination of Satterfield constituted a violation of the FMLA and, if so, what were Satterfield's damages. Based on the provisions of 29 C.F.R. §825.303, the jury was instructed in part as follows:

> An employee must give the employer notice of the employee's need to take Family and Medical Leave Act leave.
>
> ******
>
> The employee need not expressly assert rights under the Family and Medical Leave Act or even mention the Family and Medical Leave Act, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means . . ."

The jury found in favor of Satterfield on the liability issue and awarded her actual damages in the amount of $5,000.00. As a result of post-verdict motions filed by Satterfield, the district court increased Satterfield's actual damages award from $5,000.00 to $9,745.00; awarded Satterfield liquidated damages in the amount of $10,719.00; and awarded Satterfield attorney's fees in the amount of $28,577.43. Additionally, the district court ordered Satterfield reinstated in Wal-Mart's employ.

The district court entered a final judgment in the subject case embodying the above relief granted by the jury and the court. Wal-Mart appealed. The Court of Appeals reversed and rendered holding that as a matter of law Satterfield gave

inadequate notice of her need to take unforeseeable leave under the FMLA and that Satterfield was not, therefore, entitled to the protection of the FMLA.

REASONS FOR GRANTING THE PETITION

I.

THE COURT OF APPEALS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The FMLA allows eligible employees of a covered employer to take job-protected unpaid leave for up to a total of 12 workweeks in any 12 months because, *inter alia,* the employee's own serious health condition makes the employee unable to perform the functions of his or her job. 29 U.S.C. §2612(a)(1)(D); 29 C.F.R. §825.100(a).

Employee leave under the FMLA is either "foreseeable" leave or "unforeseeable" leave. Each category of leave has distinct notice requirements in terms of timing and content. The notice requirements are as follows:

Foreseeable leave

Timing of notice: Employees who know they will need time off in the future "must" inform the employer of this need at least 30 days in advance, or as soon as practicable. 29 C.F.R. §825.302(a).

Content of notice: The employee "must provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated time and duration of the leave." 29 C.F.R. §825.302(c).

Unforeseeable leave

Timing of notice: Notice "should" be given as soon as practicable under the circumstances, and "[i]t is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave." 29 C.F.R. §825.303(a).

Content of notice: "The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means." 29 C.F.R. §825.303(b).

As to the content of the notice, striking differences exist between foreseeable and unforeseeable leave. An employee desiring foreseeable leave because of her own serious health condition must make it clear to her employer that the requested leave is for an FMLA-qualifying "serious health condition " whereas an employee requesting unforeseeable leave need "only state that leave is needed." The standard for notice of unforeseeable leave is clearly much less demanding than for foreseeable leave.

When considered in the context of unforeseeable leave, the requirement of 29 C.F.R. §825.303(b) that the notice "only state that leave is needed" makes very good sense for two reasons.

First of all, many of the employees who need unforeseeable leave will, like Satterfield in the subject case, be faced with the sudden and unexpected onset of sickness incapacitating them from work. Unless these employees happen to be physicians, they, like Satterfield, are not going to know what the nature of their sickness is nor how long

their sickness will last. If they are like most people (including Satterfield), these employees will not have instant access to a physician who can tell them what the nature of their sickness is and how long their sickness will last. Thus, when these employees notify their employers of their need to take unforeseeable leave on account of their sickness, on the onset day of their sickness, there is little they can tell their employers other than they are sick and cannot report for work. If, like the Court of Appeals did to Satterfield, these employees are required to furnish more information than this to their employers to qualify for FMLA unforeseeable leave, these employees are being saddled with a burden of production that is factually impossible for them to meet.

Secondly, if these same employees are required to furnish additional information to their employers on the onset day of the employee's sickness such as information that the employee has an FMLA-qualifying serious health condition, these employees may very well be saddled with a burden of production that is legally impossible for them to meet. "Serious health condition" is a term of art under the FMLA. In many instances, an employee (like Satterfield) may not be deemed to have a "serious health condition" under the FMLA unless she has had "a period of incapacity" of more than three consecutive calendar days and has been treated "two or more times by a health care provider." 29 C.F.R. §825.114(a)(2)(i)(A). Under this scenario, it cannot be known on the onset day of the employee's sickness whether the employee has a "serious health condition." How then can the employee (such as Satterfield) provide the employer

on the onset day of the employee's sickness information that she has an FMLA-qualifying serious health condition?

As the basis for its holding that the notice given by Satterfield of her need to take unforeseeable leave was inadequate as a matter of law, the Court of Appeals concluded that Satterfield was required to, but did not, give notice to Wal-Mart that was "sufficient to reasonably apprise [Wal-Mart] of [her] request to take off for a serious health condition." In reaching this conclusion, the Court of Appeals obviously confused notice of the need to take foreseeable leave with notice of the need to take unforeseeable leave and applied the former when it should have applied the latter. Yet, barring intervention by this Court, this erroneous application of the law will now control all workers in Texas, Louisiana, and Mississippi seeking unforeseeable leave under the FMLA.

As noted by the Court of Appeals, the note Satterfield sent to Wal-Mart on June 16, 1995, notified Wal-Mart that she was having a lot of pain and that she would not make it in to work that day. Although the Court of Appeals incorrectly suggests otherwise, this was all that Satterfield knew about her condition at any time on June 16, 1995. Whether or not Satterfield's note satisfies the content requirement for foreseeable leave, the note easily satisfies the minimal content requirement for unforeseeable leave. The content of the note, i.e., I am sick and need to be off work today, is semantically indistinguishable from the minimal regulatory admonition that the notice "only state that leave is needed."

Wal-Mart jumped the gun when it fired Satterfield on the onset day of her illness without utilizing the clarification and certification process provided in the FMLA and applicable regulations. If store manager Mark Neighbors believed Satterfield's notice was inadequate, he should have done as he was "expected" to do and obtained "additional required information through informal means." 29 C.F.R. §825.303(b). In addition, Neighbors could and "should" have requested that Satterfield "furnish certification from a health care provider . . . within two business days" after Satterfield's leave commenced. 29 C.F.R. §825.305(c). Had Wal-Mart utilized this clarification and certification process instead of firing Satterfield, it could have protected itself against possible abuse of FMLA leave while at the same time, avoided violating Satterfield's leave rights under the FMLA.

For unforeseeable leave, the Department of Labor regulations accept the reality that the true nature of the illness may not be known immediately. Contrary to the assertion of the Court of Appeals, it would have made no possible difference whether Satterfield had spoken at length with Neighbors on the onset day of her illness, which was also the day she was fired. On that day, neither Satterfield nor Neighbors could have known that her illness would develop into an FMLA-qualifying serious health condition. On the onset day of an illness, most employees will only know that leave is needed that day, and the Department of Labor regulations sensibly refrain from requiring more.

In deciding that Satterfield's notice of her need to take unforeseeable leave was inadequate as a matter of law and

that Satterfield was subject to discharge on the onset day of her illness, the Court of Appeals decided two important questions of FMLA law which have not been, but should be, settled by this Court. The importance of these two questions of FMLA law can best be illustrated by imagining the following situation. An employee wakes up with a pain in her side. The employee has never had the pain before, does not know what is causing it nor how long it is going to last. The employee honestly and innocently informs her employer that she will not be at work that day because of the pain. The employer fires the employee that same day before anyone can tell whether the pain is going to develop into an FMLA-qualifying serious health condition. The employee's medical insurance is canceled by the employer, the employee waits months before she is approved for Medicaid, and the employee only then has the necessary surgery. This was Melanie Satterfield's nightmare, and it will be a nightmare facing thousands of other workers unless this Court intervenes.

II.

THE COURT OF APPEALS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH AN APPLICABLE DECISION OF THIS COURT.

Although the Court of Appeals quoted 29 C.F.R. §825.303 in its opinion, it declined to follow the content of notice provision contained in subsection (b) of this regulation.

In lieu of following 29 C.F.R. §825.303(b), the Court of Appeals formulated and applied its own content of notice rule that requires an employee seeking unforeseeable leave to

give the employer notice that is "sufficient to reasonably apprise [the employer] of the employee's request to take time off for a serious health condition." To the extent this rule follows any FMLA regulations, it follows 29 C.F.R. §825.302(c) governing notice of the need to take foreseeable leave.

Additionally, the Court of Appeals completely reversed the burden of production provision of 29 C.F.R. §825.303(b). Rather than requiring Wal-Mart "to obtain any additional required information through informal means" after Satterfield notified Wal-Mart of her need to take unforeseeable leave as required by §825.303(b), the Court of Appeals required Satterfield to obtain and provide such additional information.

29 C.F.R. §825.220(c) prohibits employers from using "the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions."

In the words of the Court of Appeals, store manager Mark Neighbors

> testified further that, because Satterfield's 16 June absence was her fourth failure to report for work in three weeks, he decided to discharge her, in accordance with Wal-Mart's policy, which allows termination for excessive absences. He testified that, in making that decision, he took into account the unexcused absences on 28 and 29 May and 3 June; and that he would not have terminated Satterfield only for missing work on 16 June.

The Court of Appeals approved and endorsed Neighbors' stated reason for firing Satterfield notwithstanding that such reason constituted a clear violation of 29 C.F.R. §825.220(c).

29 C.F.R. §825.220 and 825.303, like other FMLA regulations, were promulgated by the Secretary of Labor pursuant to statutory authority. In *Chevron U.S.A. v. National Res. Def. Counsel,* 467 U.S. 837, 844 (1984), this Court held that regulations such as this are entitled to "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."

Having failed to find that either 29 C.F.R. §825.220(c) or §825.303(b) were arbitrary, capricious, or manifestly contrary to the FMLA, the Court of Appeals should have given these regulations controlling weight and followed same. The decision of the Court of Appeals to decline to follow these regulations is in conflict with the decision of this Court in *Chevron.*

III.

THE COURT OF APPEALS IN THE SUBJECT CASE HAS RENDERED A DECISION ON AN IMPORTANT MATTER IN CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER.

In *Price v. City of Fort Wayne,* 117 F.3d 1022 (7th Cir. 1997), an FMLA case, the Seventh Circuit states as follows regarding notice of the need to take unforeseeable leave under the FMLA:

> The City contends that by asking for paid leave only, and not also for unpaid leave, Price foreclosed the inference that she might be interested in FMLA leave. But the Department of Labor regulations repeatedly emphasize that it is the employer's responsibility to determine the applicability of the FMLA and to consider requested leave as FMLA leave. For example, '[t]he employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means.' 29 C.F.R. §825.303(b). (emphasis supplied) 117 F.3d at p. 1026

The Court of Appeals' decision in the subject case is in conflict with the Seventh Circuit's decision in *Price* in the following particulars:

(1) The Court of Appeals in the subject case holds that an employee seeking unforeseeable leave under the FMLA must provide her employer with additional information beyond simply that leave is needed. The employee must provide her employer with notice that is "sufficient to reasonably apprise [the employer] of the employee's request to take off for a serious health condition." The notice requirement of the Court of Appeals in the subject case is far more demanding than the notice requirement of the Seventh Circuit in *Price* and is quite close to, if not the same as, the notice requirement for FMLA foreseeable leave.

(2) The Court of Appeals in the subject case holds that when the employee notifies the employer only that leave is needed, the employee, not the employer, has the burden of obtaining and providing "any additional required information." Consistent with the provisions of 29 C.F.R. §825.303(b), the Seventh Circuit in *Price* puts this burden of production on the employer.

These conflicts are important matters under the FMLA and should be conclusively resolved by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted

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